Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

ATLANTIC RICHFIELD COMPANY, et al.,
Petitioners,

v.

NEWMAN OIL COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

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June 22, 1979

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Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

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The petitioner Atlantic Richfield Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Temporary Emergency Court of Appeals entered in this proceeding on April 20, 1979. Other petitioners for writ of certiorari are Foremost Petroleum Corporation, Inc., and Albert B. Alkek. Respondents are: Newman Oil Company; Advance Petroleum Distributing Company, Inc.; B&H Oil Company; Chambles Oil Company; D&S Service Company, Inc.; Econ-O-Gas, Inc.; Fuel Distributors, Inc.; Gabbert Oil Company; Gooding Oil, Inc.; Crain Oil Co.; Havard Oil Company, Inc.; Henderson Oil & Butane Co.; Hinson Oil Co., Inc.; Hunt County Oil Co., Inc.; Ben Ivey Oil Company; Newcomer Butane & Oil Co.; Martin Oil Company; R. L. More & Son; Oates Oil Co.; Permian Oil & Tire Co., Inc.; W. C. Rinks Oil Co.; Rodgers Oil Company; Ray Schlichting Oil Co.; Service Oil Co.; Tandem Oil Co.; Ralph Watson Oil Co., Inc.; D. L. Watson Oil Company; Marsh Oil Co., Inc.; Lamberth Oil Co.; Hornet Distributing Co.; Stapp

Oil Co.; Hrncir Oil Co.; Whitten Oil Co., Inc.; Mason Oil Company; J. G. Moore Oil Co.; Neal's Oil & Butane, Inc. and Kelso Oil Company.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Northern District of Texas, appearing in the Appendix hereto, has not been reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on April 20, 1979. Atlantic Richfield Company's timely petition for rehearing and suggestion of *en banc* proceedings was denied on May 25, 1979, and this petition for writ of certiorari is filed within 30 days of that date pursuant to Section 211(g) of the Economic Stabilization Act, 12 U.S.C. § 1904 note. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a federal court can adjudicate a claim that plaintiffs were fraudulently induced to forego protest of prior discretionary rulings within an administrative agency's exclusive jurisdiction, in the absence of prior consideration of the claim by the agency.

STATUTORY PROVISION INVOLVED

Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

§ *210. Suits for damages or other relief*

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

STATEMENT OF CASE

Plaintiffs-Respondents, oil jobbers located in Texas, purchased petroleum products from Defendant-Petitioner Atlantic Richfield Company (hereinafter "Atlantic Richfield") in the years prior to 1976. In late 1976, Atlantic Richfield sold its Texas pipeline terminals to Defendant-Petitioner Foremost Petroleum Corporation, Inc. (hereinafter "Foremost"). Contemporaneously with the sale of the pipeline terminals, Atlantic Richfield, all of the Plaintiffs, and Foremost executed three-party agreements on standard forms [form "FEA 04-164 (Rev. 9/76)"] provided by the Federal Energy Administration (hereinafter "FEA"), consenting to the restructuring of their supplier/purchaser relationships. *See* Three-Party Agreement (Model) (A-30).

Subsequently, the FEA entered discretionary orders whereby Atlantic Richfield's relationships with the Plaintiffs were terminated, and Atlantic Richfield was ordered to supply Foremost and Foremost was ordered to supply the Plaintiffs. *See* Order — Termination of Supplier/Purchaser Relationship (December 22, 1976) (A-19); Assignment Order (November 18, 1976) (A-22); Assignment Order (Model) (November 22, 1976) (A-25).

On April 1, 1977, without consulting or seeking any modification, exception or other relief from the FEA, Plaintiffs filed suit in the United States District Court for the Northern District of Texas. Thereafter, motions for dismissal

were filed by Defendants Atlantic Richfield, Foremost and Albert B. Alkek (hereinafter "Alkek").

On December 15, 1977, the District Court held a hearing at which time Plaintiffs' counsel informed the District Court that Plaintiffs' federal causes of action depended entirely on Defendants' being liable for a violation of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§751 *et seq.* (hereinafter "EPAA"). Plaintiffs' counsel also informed the District Court that Plaintiffs' theory of liability under the EPAA depended wholly on Foremost's being required under existing law, regulations and the FEA's orders to the parties to charge the Plaintiffs the same prices which Atlantic Richfield had charged the Plaintiffs prior to the FEA's orders. *See* Opinion pp. 2-3 (A-13 — A-15). The District Court subsequently entered an Order and a Judgment, dismissing with prejudice Plaintiffs' federal causes of action and dismissing without prejudice Plaintiffs' allegedly pendent state law claims (there being no diversity of citizenship jurisdiction over the Plaintiffs' claims). The District Court's decision centered on the Plaintiffs' theory for their federal causes of action and concluded that the FEA orders, properly interpreted in the light of applicable statutes and regulations, did not require Foremost to adhere to Atlantic Richfield's former prices.

> After reviewing the pleadings and briefs in this case, I conclude that: (1) the price question is the key issue for the Court to decide in this case, and (2) Foremost was not required to supply the Plaintiffs with motor fuel at Arco's base price.

See Opinion p. 3 (A-14).

From this Order and Judgment, Plaintiffs appealed to the Temporary Emergency Court of Appeals, as well as alternatively to the Court of Appeals for the Fifth Circuit.

To date, the Fifth Circuit has kept Plaintiffs' appeal in abeyance, in deference to the jurisdiction of the Temporary Emergency Court of Appeals (hereinafter "TECA").

Plaintiffs adhered to their singular theory of federal law liability until the argument before TECA, when Plaintiffs' counsel orally added an additional theory — that fraud in violation of federal law was committed by some or all of the Defendants in inducing the Plaintiffs to execute the Three-Party Agreements and thereby to relinquish their alleged right under the EPAA not to be charged more than Atlantic Richfield's maximum allowable prices.

On April 20, 1979, TECA, relying on the newly-expressed theory of federalized fraudulent inducement, reversed the summary judgment rendered against the Plaintiffs in the Northern District of Texas and remanded the case to the District Court for further proceedings. Although finding no error in the trial court's legal interpretation of the FEA's orders as not requiring Foremost's adherence to Atlantic Richfield's former prices, TECA felt that the District Court should have considered evidence as to whether or not the Plaintiffs were defrauded. TECA noted no inconsistency in apparently approving a holding under the EPAA of no illegal overcharge to the Plaintiffs, while at the same time holding that Plaintiffs might have been overcharged under the EPAA by reason of alleged fraud. *See* Opinion (A-2).

On May 25, 1979, TECA denied the petitions for rehearing and suggestions of *en banc* proceedings filed by Atlantic Richfield, Foremost and Alkek.

Atlantic Richfield now files this Petition for Writ of Certiorari, seeking reversal of the decision of the Temporary Emergency Court of Appeals and affirmance of the District Court's dismissal of Plaintiffs' case.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With The Decision Of This Court As To The Jurisdiction Of A Federal Court To Render Discretionary Administrative Rulings.

TECA's remand of the Plaintiffs' fraud claims to the District Court would place the trial court in the position of having to determine (1) whether fraud occurred, (2) which resulted in the Plaintiffs' being charged more than would have been allowed by the FEA under the EPAA and the Economic Stabilization Act of 1970 (hereinafter "ESA"), 12 U.S.C. § 1904 note.

This Court has held already that a federal court may not entertain such a claim, because the ascertainment of the charge which the agency would have allowed in the absence of fraud places the court in the position of exercising discretion which lies within the exclusive jurisdiction of the federal agency. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) (hereinafter "*Montana-Dakota*").

Montana-Dakota involved a claim made pursuant to 28 U.S.C. §§ 1331 and 1337, for overcharges allegedly made in violation of the Federal Power Act, ch. 285, 41 Stat. 1063 (1920); ch. 687, 49 Stat. 803, 838 (1935); ch. 351, 62 Stat. 275 (1948).

> Petitioner and respondent are public electric utilities companies engaged in interstate commerce. Petitioner's predecessor and respondent were under the same management through interlocking directorships and joint officers. During that relationship the two interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. These contract rates and charges are at the root of this controversy. Petitioner charges that during the period 1935-1945, its predecessor paid respondent unreasonably high prices for what respondent furnished it, and that it received unreasonably low rates for what it provided respondent. That advantage, it is alleged, was fraudulent and unlawful and was due to the interlocking directorate, which prevented protest to the Commission to have reasonable rates and charges established pursuant to the provisions of the Federal Power Act.
>
> Petitioner sued in United States District Court and asserted jurisdiction on the ground that the case "arises under the Constitution or laws of the United States" and, more particularly, under a "law regulating commerce," specifically the Federal Power Act.
>
> Petitioner was successful in the District Court, which found the contracts void for fraud and the rates and charges established therein unreasonable. The court also determined what would have been reasonable rates and charges for the period in question and gave judgment for the difference between its conception of reasonable charges and the actual charges, amounting to over three-quarters of a million dollars.
>
> The judgment was reversed by the Court of Appeals for the Eighth Circuit on the ground that the District Court was without jurisdiction.

341 U.S. at 247-48.[1]

In the instant case, Plaintiffs also allege fraud which prevented their protesting the FEA's approval of the 1976 changes in supplier/purchaser relationships and the concomitant changes in the prices allowed to be charged the Plaintiffs under the EPAA and ESA. Plaintiffs also allege in this case that they have been charged prices in excess of

[1] Unless otherwise noted, footnotes in quoted material are omitted.

those which the FEA would have allowed but for the Defendants' alleged fraud.

This Court in *Montana-Dakota* quite properly perceived that the petitioner's suit for fraud impermissibly sought to have a federal court make a discretionary ascertainment of rates, the determination of which was the federal agency's alone to make.

> But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that power, both regard reasonableness as a justifiable legal right rather than a criterion for administrative application in determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.
>
> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not

> even a court can authorize commerce in the commodity on other terms.
>
> We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.

341 U.S. at 251-52.

Like the Federal Power Commission, the FEA [and its successor the Department of Energy (hereinafter "DOE")] has been the agency charged by Congress with the power to make discretionary rulings as to the allocation and pricing of petroleum products. Emergency Petroleum Allocation Act, 15 U.S.C. § 753 (1975);[2] Federal Energy Administration Act, 15 U.S.C. §§ 765 and 766 (1974);[3] Department of Energy Organization Act, 42 U.S.C. §7151 (1977).[4] Such rulings, by necessity and by the mandate of Congress, involve a considerable amount of discretion.

> [T]o deny to the [FEA] the power in question would be inconsistent with the broad discretion and flexibility

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[2] 15 U.S.C. § 753 provides in pertinent part in subpart (a) that "the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in . . . and at prices specified in . . . such regulation." Subparts (c)(3) and (c)(4) provide for adjustments by the President (or his delegate) to allocations as "may reasonably be necessary" to accomplish a number of listed market and public interest objectives.

[3] 15 U.S.C. § 765 provides in pertinent part for the vesting in the Federal Energy Administrator of the functions related to petroleum products allocation and pricing. 15 U.S.C. § 766(i)(1)(D) parallels 15 U.S.C. §§ 753(c)(3) and (4) in mandating discretionary adjustment relief by the FEA.

[4] 42 U.S.C. § 7151 transfers the Federal Energy Administrator's functions to the Secretary of the Department of Energy.

> we have consistently recognized in the agency's mandated attainment of the objectives of the EPAA.

Marathon Oil Co. v. FEA, 547 F.2d 1140, 1145 (TECA 1976), *cert. denied*, 430 U.S. 983 (1977).[5] Such discretion having been delegated by Congress to the FEA, the courts may not usurp that delegated discretion.

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. . . . It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

Powerine Oil Co. v. FEA, 536 F.2d 378, 385 (TECA 1976), quoting from *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 580-84 (1940).

Having rejected petitioner's attempt to place a federal court in the position of setting rates, this Court in *Montana-Dakota* considered the argument that fraudulently inducing a party not to protest the Commission's action warranted bringing the case within the jurisdiction of the federal courts.

> The petitioner's problem is to avoid Scylla without being drawn into Charybdis. If its cause of action arises

[5] The court in *Marathon Oil Co. v. FEA, supra,* was considering the FEA's regulation of credit terms under the EPAA.

> from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction, there being no diversity in citizenship of these parties. But if it arises from being charged rates in excess of those permitted by the Power Act, it is confronted with the exclusive powers of the Commission to determine what those rates are to be.

341 U.S. at 250.

> If the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one. The Federal Act adds nothing to fraud as an actionable wrong, and, therefore, to find a cause of action of this character would only be to dismiss it for want of diversity.

341 U.S. at 252.

Plaintiffs here have sued Foremost and Alkek, both of whom reside in Plaintiffs' state of residence—Texas. First Amended Complaint ¶¶ 7-8 (R. 63-64). Hence no diversity of citizenship jurisdiction exists for Plaintiffs' claims. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Furthermore, because the adjustment of allocations and prices is a discretionary power given to the FEA's exclusive jurisdiction under the EPAA and ESA, Plaintiffs' causes of action for fraud gain nothing by the passage of either federal statute. In short, as in *Montana-Dakota*, Plaintiffs cannot maintain a common law cause of action for fraud in the District Court for want of diversity, and cannot maintain a federal cause of action in the District Court because their claim depends on a discretionary ruling which could only be made by the FEA.

The decision in *Montana-Dakota* clearly requires that the Plaintiffs' claims of fraud in this case be dismissed, and not stayed (or remanded) pending reference of the issue of price to the FEA.

> It is true that in some cases the Court has directed lower federal courts to stay their hands pending reference to an administrative body of a subsidiary question. [Authorities omitted]. But in all those cases the plaintiff below concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary. In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues. Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud.

341 U.S. at 253-54. Plaintiffs' suit for fraudulent inducement relies entirely on their showing Foremost's prices to be in excess of what the FEA would have ordered absent the alleged fraud.[6] Thus, the issue of FEA's discretion is central to proof of injury and to Plaintiffs' case, and under the holding of *Montana-Dakota* no federal jurisdiction exists for TECA to remand this case to the District Court.

TECA's opinion recognized the significance of *Montana-Dakota* to the present case, but attempted to distinguish the case.

> There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 241, 250 (1951). Jurisdiction in that case, however, was derived from 28 U.S.C. §§ 1331 and 1337 as a civil action arising under an act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for "[A]ny person suffering legal wrong because of any act or practice arising out of this title. . . ." We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

See Opinion pp. 7-8 (A-8 — A-9).

TECA's distinction is conclusory and without meaning. 28 U.S.C. § 1331 (1948) provided in pertinent part

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States.

Section 1337 of the same Title provides

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. § 1337 (1948). As is evident, the scope of Sections 1331 (federal question) and 1337 (commerce clause) is much broader than and overlaps that of Section 210(a) of the ESA. For that reason, the *Montana-Dakot*a holding that a fraud action does not come within the purview of the two broad jurisdictional statutes establishes *a fortiori* that a fraud action similarly does not come within the narrower purview of Section 210(a).

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[6] The District Court and apparently TECA have already ruled that Plaintiffs' cause of action based on what the FEA did order is deficient as a matter of law. *See* Opinion p. 3 (A-14) and Opinion p. 8 (A-9).

TECA's distinction of *Montana-Dakota* is illusory, and TECA's holding based on such an illusory distinction directly conflicts with this Court's decision. By ignoring *Montana-Dakota*, TECA's decision threatens to subvert DOE's unified control of discretionary relief and to open the district courts to all those who want to circumvent the DOE's jurisdiction through the device of an allegation of fraud preventing the protest of prior administrative action. This Court should accordingly issue a writ of certiorari to the Temporary Emergency Court of Appeals to resolve the conflict in decisions.[7]

[7] In order to avoid unnecessary redundancy, Atlantic Richfield Company generally supports pursuant to Supreme Court Rules 21.4 and 46 the position taken by Foremost Petroleum Corporation, Inc. and Albert B. Alkek in their petition for a writ of certiorari, without restating the arguments and authorities presented in such petition.

CONCLUSION

For the reasons stated in this petition and in the petition of Foremost Petroleum Corporation and Albert B. Alkek, a writ of certiorari should issue to review the judgment and opinion of the United States Temporary Emergency Court of Appeals.

Respectfully Submitted,

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June 22, 1979

APPENDIX

1. Order Respecting Rehearing of the Temporary Emergency Court of Appeals

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY, et al.
Plaintiff-Appellant

v.

ATLANTIC RICHFIELD COMPANY, ALBERT B. ALKEK AND FOREMOST PETROLEUM CORPORATION, INC.
Defendants-Appellees

BEFORE HONORABLE WALTER E. HOFFMAN, HONORABLE JOE M. INGRAHAM AND HONORABLE WALTER P. GEWIN, JUDGES

Upon consideration of the Petitions for Rehearing and Suggestions for Rehearing *En Banc* of appellees Atlantic Richfield Company, Albert B. Alkek and Foremost Petroleum Corporation,

IT IS HEREBY ORDERED that said Petitions and Suggestions are hereby DENIED.

FOR THE COURT:
RUTH H. JACOBSON
Clerk

by: /s/ MELISSA FRINK
Melissa Frink
Deputy Clerk

May 25, 1979

2. Opinion of the Temporary Emergency Court of Appeals

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLIS OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO., INC.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; BOSSE OIL CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC. and KELSO OIL COMPANY,

PLAINTIFFS-APPELLANTS,

v.

ATLANTIC RICHFIELD COMPANY, ALBERT B. ALKEK and FOREMOST PETROLEUM CORPORATION, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

(No. CA3-77-0435-F)

(Argued December 15, 1978 Decided April 20, 1979)

JOHN FEATHER, Johnston and Feather, P.C., Dallas, Texas (John C. Gabbert on brief) for the Appellants.

THOMAS R. MCDADE, Fulbright & Jaworski, Houston, Texas (Alton F. Curry, Steven E. Segal, Louis S. Zimmerman, and David L. Tolin of the same firm on brief) for the Appellees, Albert B. Alkek and Foremost Petroleum Corporation, Inc.

GREGORY S. C. HUFFMAN, Thompson & Knight (Jerry L. Buchmeyer, and David R. McAtee of the same firm on brief and William John Rathje, Los Angeles, California, of counsel) for Appellee, Atlantic Richfield Company.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

HOFFMAN, Judge.

Appellants, a large number of local distributors of petroleum products, brought suit against appellees alleging violations of the antitrust laws of the United States and Texas, the Emergency Petroleum Allocation Act of 1973 (the EPAA), the Clayton Act as amended, and common law breach of contract and false representation. There is no diversity of citizenship involved. Appellees filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. The district court elected to interpret the motions to dismiss as motions for summary judgment, and dismissed with prejudice all of appellants' federal claims without any discovery proceedings. However, the court gave no notice to the parties that the motions were to be disposed of under Rule 56, and no opportunity was provided to file affidavits or other materials pertinent to appellants' claims. We are, therefore, compelled to reverse and remand for further proceedings.

The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, et seq. (1976), was enacted to alleviate the

shortages of petroleum products brought on by the Arab oil embargo. Distributors were required to return to the supplier who had supplied them in the 1972 base period, and were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of petroleum products they had received from the supplier in the 1972 base period as compared to the total output of that refiner in the corresponding period of each year thereafter. Cost increases in refining the product are added to the base prices, primarily on a dollar-for-dollar basis. Provision is made for changing or substituting suppliers, pursuant to regulations of the Federal Energy Administration.[1]

The Atlantic Richfield Company (ARCO) was appellants' 1972 base period supplier. In late 1976 or early 1977 ARCO sold its Texas pipeline terminals to the Foremost Petroleum Corporation (Foremost) at which time ARCO, Foremost and each of the appellants executed three-party agreements on standard FEA forms which petitioned the agency to terminate ARCO's obligations as base period supplier and to assign the appellants' base period entitlements to Foremost. The three-party agreements were submitted to the agency for approval, and the FEA subsequently entered orders based on the agreements. The agreements make no mention of price, but refer only to volume. Appellants allege in the fourth count of their complaint that Albert B. Alkek, who exercised full authority over the day-to-day petroleum sales and distribution operations of Foremost, "falsely promised that each of the Plaintiffs would have the same price and other terms for the purchase of motor gasoline and diesel fuel as they had with ARCO (the base period

[1] FEA became a part of the Department of Energy on October 1, 1977, 42 U.S.C. § 7151(a); Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). This opinion will refer generally to the FEA, as did the order of the district court.

supplier) and in effect would enjoy the same business practices as prevailed with ARCO during the base period subject to the legitimate adjustments available to ARCO." Appellants allege that within weeks thereafter Foremost "willfully and maliciously" instituted unilateral discriminatory and retaliatory price increases with intent to injure the appellants and remove them from competition with Foremost. In addition to price increases, appellants allege that Foremost willfully imposed discriminatory supply terminal requirements, withheld established freight allowances, and restricted credit terms, all contrary to normal business practices. The sixth count of the complaint sought recovery of damages against Foremost for breach of contract, against Alkek for inducing such breach of contract, and against both Foremost and Alkek for false and fraudulent promises and representations.

The fourth count alleges that "the Defendants [including ARCO] have undertaken a willful course based upon false and fraudulent promises to knowingly and drastically vary the base period supplier-purchaser relationships had by the Plaintiffs and other members of the Class." This allegation of fraud, while thin as to ARCO, is sufficient to withstand a Rule 12(b)(6) motion.

On December 15, 1977, the district court held a hearing on the appellees' motions to dismiss. No court reporter was present. The opinion of the district court indicates that, at the time of the hearing, counsel for both sides were in apparent agreement that the key issue in the case was whether or not Foremost was required to supply the appellants with motor fuel at ARCO's base price, and that the antitrust allegations made in appellants' complaint derived in their entirety from the alleged violations of the EPAA and the regulations promulgated thereto. Counsel for appel-

lants stated at oral argument that the district court had indicated it would rule on the motion to dismiss within a week or ten days, and that the court at no time intimated that it intended to consider the motions under Rule 56. This statement is not contradicted. Eight months later the court entered the order granting summary judgment for the appellees.

The 1946 amendment to Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Moore's instructs: "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment." Advisory Committee Note of 1946 to Amended Subdivision 12(b) *Moore's Federal Practice*, Vol. 2A, ¶12.09[3] n. 25, at 2302. *See also* Wright and Miller, *Federal Practice and Procedure*, Vol. 5 § 1366, at 683. Rule 56(c) requires a ten-day period from the offering of the motion to the hearing of the motion, during which affidavits may be made and offered. Courts have required strict adherence to this notice requirement when a Rule 12(b)(6) motion is converted into a Rule 56 motion. *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977); *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976). It is not necessary that the notice of the conversion of the 12(b)(6) motion to one for summary judgment be made by written order; however, the record must demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity to the non-moving party to rebut the converted motion. Since there is nothing in the record to indicate that the requisite notice was given, we find it necessary to reverse and remand to the district court. We express no view as to the final result in this case or whether, after further proceedings, a motion for summary judgment is in order.

A substantial question has been raised on appeal as to the jurisdiction of the federal court over claims involving common-law fraud. In essence appellants' theories of recovery center on their contention that they executed the three-party agreements as a result of assurances received from Alkek that prices and terms when dealing with Foremost would be "at least as good as those supplied by ARCO."[2] From this beginning point appellants sought to establish either that the three-party agreements are broad enough to include an agreement on price, or that pertinent FEA regulations establish price because of the nature of Foremost's acquisition of ARCO's terminals. Alternatively, appellants alleged that the assurances they received were fraudulent and constituted a willful attempt to circumvent the petroleum allocation act and regulations. Appellees argue that allegations of fraud are state law claims not cognizable in federal court under the jurisdictional prerequisites of the Economic Stabilization Act (ESA).

The EPAA, at 15 U.S.C. § 754(a)(1), adopted the provision for damages or other relief of the ESA, 12 U.S.C. § 1904

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[2] Statement of counsel at oral argument on appeal.

note (1969 Supp.).[3] This court has broadly interpreted § 210(a) of the ESA to allow the recovery of any damages arising from any legal wrong, and has interpreted § 210(b) as creating a special remedy for overcharges rather than a limit on damages available under § 210(a). *Griffin v. United States*, 537 F.2d 1130, 1135-36 (Em.App. 1976); *cf Arnson v. General Motors Corporation*, 377 F.Supp. 209, 212 (N.D. Ohio 1974). There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 241, 250 (1951).[4] Jurisdiction in that case, however, was derived from 28 U.S.C. §§ 1331 and 1337 as a civil action arising under an act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for "[A]ny person suffering legal wrong because of any act or practice arising out of this title. . . ." We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

[3] § 210. Suits for damages or other relief.

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulations issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211) and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharges upon which the action is based, or

(2) not less than $100 or more than $1,000; . . . .

[4] This case involved two public electric utilities companies who were at one time under the same management through interlocking directorships and joint officers. During that relationship the two companies interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. The plaintiff company alleged that the interlocking directorships resulted in a constructive fraud, in that it paid unreasonably high prices for what it received, and unreasonably low rates for what it provided. The Court in effect held that it was the exclusive power of the Commission to establish reasonable rates, and that the Federal Power Act added nothing to the pre-existing common-law right not to be defrauded into paying an excessive or unreasonable rate. Mr. Justice Frankfurter dissented, joined by three other justices.

It is the failure of the court to give notice of the conversion of the motion that principally necessitates the remanding of this case for further proceedings. We find no error in the manner in which the court construed the termination agreements on their face. The agreements make no mention of price, and the FEA has ruled that a purchaser who enters into a termination agreement, requesting and receiving FEA approval of the termination, thereby becomes a new wholesale purchaser under the express language of 10 C.F.R. 211.12(e). Interpretation 1977-28, 42 Fed. Reg. 46271, Sept. 15, 1977 (Mobil Oil Corporation). While we believe that appellants sufficiently stated their allegations of fraud and willfulness in the fourth and sixth counts of their amended complaint, we appreciate the opinion of the district court that price is the key issue, since it would appear that appellants' allegations of fraud were at all times secondary to their attempt to establish price under the per-

tinent regulations.[5] Nevertheless, "[T]he concepts of notice, admissibility, and opportunity to be heard are ancient primaries. . . . However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice." *Davis v. Howard, supra,* at 572.

VACATED AND REMANDED.

[5] Econ-O-Gas, Inc., an appellant herein, submitted an application for exception and petition for special redress to the Department of Energy, seeking relief from the three-party agreement it had signed with ARCO and Foremost. In denying relief, the DOE stated that Econ-O-Gas had not alleged that it was coerced in entering into the three-party agreement, and added that it was not the FEA's responsibility to make certain that Econ-O-Gas had read and understood the pricing regulations which would govern its relationship with Foremost or that the firm had reached a contractual relationship which it would find satisfactory from a business standpoint. Apparently fraud was not alleged before the DOE. See *Econ-o-Gas, Inc.*, Case Nos. DEE-1416, DSG-0031, 2 DOE ¶ ——— (February 12, 1979).

3. Judgment of the United States District Court

In the
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEWMAN OIL COMPANY, et al.

Vs. **No. CA3-77-0435-F**

ATLANTIC-RICHFIELD CO., et al.

JUDGMENT

The Court dismisses with prejudice all of the Plaintiffs' claims asserted against the Defendants under the laws of the United States of America. The Court dismisses without prejudice the Plaintiffs' pendent claims asserted under state law against the Defendants. Each of the parties shall bear their own costs.

It is so ORDERED.

/s/ ROBERT W. PORTER
United States District Judge

DATE: August 15, 1978

4. Opinion of the United States District Court

In the
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEWMAN OIL COMPANY, et al.

Vs. **No. CA3-77-0435-F**

ATLANTIC-RICHFIELD CO., et al.

ORDER

This is a suit brought by a large number of local distributors of motor gasoline against the Defendants alleging violations of the antitrust laws of the United States, the Emergency Petroleum Allocation Act of 1973, the Clayton Act as amended by the Robinson-Patman Act, and common law breach of contract and false representation. Defendants' motions to dismiss, which I interpret broadly as motions to to dismiss and motions for summary judgment, are before the Court for discussion.

In their complaint Plaintiffs allege that during the period of time prior to 1972 there was an excess supply of motor gasoline and Plaintiffs and other members of the class who purchased gasoline from the major oil companies could cease doing business with one company and choose another supplier. In 1973, with the advent of the nationwide gasoline "shortages", and the enactment by Congress of the Emer-

gency Petroleum Allocation Act of 1973 (15 U.S.C. 751, et seq.) Plaintiffs were required to return to the supplier who had supplied them in the 1972 base period. They were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of motor gasoline they had received from the supplier in the 1972 base period as compared to the total motor gasoline output of that refiner in the corresponding period of 1974 and each period thereafter. The regulations of the FEA permit the change in suppliers, but after the advent of the "shortages" and enactment of the EPAA, a change of suppliers was not possible for the Plaintiffs and the other members of the class because virtually all motor gasoline sold by suppliers was allocated to specific customers, including the Plaintiffs and other members of the class. Plaintiffs therefore allege that in order to be able to change suppliers, there must be a supplier who has a sufficient supply of unallocated motor gasoline which it would be willing to irrevocably allocate to supply the needs of one of the Plaintiffs, and Plaintiffs contend that such a supplier is impossible to find in view of the large volumes of motor gasoline which Plaintiffs and other members of the class are committed to supply to others.

The Atlantic-Richfield Co. (Arco) was supplying gasoline to the Plaintiffs during the "shortage" period. In late 1976 or early 1977 Arco sold its Texas pipeline terminals to Foremost, and transferred to Foremost its supply obligations to the Plaintiffs and other members of the class. The essence of Plaintiffs' complaint, as I interpret it, is that after Foremost acquired a supplier relationship with the Plaintiffs, Foremost raised its prices for gasoline to the Plaintiffs, and allegedly attempted to force the Plaintiffs out of business.

On December 15, 1977, I held a hearing on the Defendants' motions to dismiss. At that time counsel for both sides were

in apparent agreement that the key issue in this case was whether or not Foremost was required to supply the Plaintiffs with motor fuel at Arco's base price, and that the antitrust allegations made in Plaintiffs' complaint derived in their entirety from the allegations by Plaintiffs of violations of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 et seq. the Federal Energy Administration Regulations thereunder, 10 CFR of §§210-212, and §210 of the Economic Stabilization Act of 1970, 12 USC §1904. Plaintiffs contend that Foremost was required to supply motor fuel at Arco's base price, and that therefore the EPAA was violated, and that therefore the Texas and United States antitrust laws were violated. Counsel were in apparent agreement that if I concluded that Foremost could legally charge higher prices than Arco in supplying the Plaintiffs, the Plaintiffs' EPAA claims would be without merit, the Plaintiffs' antitrust claims would therefore be without merit, and Plaintiffs' state claims could be dismissed without prejudice to refiling in the State Court. After reviewing the pleadings and briefs in this case, I conclude that: (1) the price question is the key issue for the Court to decide in this case, and (2) Foremost was not required to supply the Plaintiffs with motor fuel at Arco's base price.

Plaintiffs all apparently entered into "three party agreements" with Arco and Foremost to terminate Arco's supplier relationship with the Plaintiffs and substitute Foremost Petroleum. These agreements were submitted to the FEA, because under FEA regulations the supplier-purchaser relationship cannot be terminated without agency approval. 10 C.F.R. §211.9(a)(2)(i). Without Plaintiffs' consent to a permanent change in the supplier-purchaser relationship (consent which was given by the Plaintiffs in their execution of the three-party agreements) Arco and Foremost would

have had to seek FEA approval of the change through an FEA exception proceeding. 10 C.R.F. §205.50 et seq.

Plaintiffs review the third party agreements and conclude that either the agreements themselves or FEA orders contemplate Foremost's obligation to provide each of the Plaintiffs with their base period entitlement of given volume of motor gasoline. Plaintiffs interpret this requirement as being substantially broader than simply a given number of gallons of motor gasoline, but rather includes an obligation to supply the gasoline at the same price. Plaintiff's contention is summarized on page 14 of its response to Defendant's motions for dismissal, filed October 18, 1977.

> "Essentially, but without limitation, the full obligation is: (1) *volume* 10 C.F.R., Parts 210 and 211; Product availability, 10 C.F.R., Page 210; (3) price, 10 C.F.R., Parts 210 and 212; (4) Credit terms, 10 C.F.R., Parts 210 and 212; and (5) Freight policy, 10 C.F.R., Part 210 as these essential factors existed during the 1972 base periods of the buyer/purchaser relationship (Arco/Plaintiffs) and as established by the May 15, 1973 price charged by Arco to the Plaintiffs (with proper adjustments allowable to Arco)."

The first problem with Plaintiffs' argument is that the agreement itself refers only to an "assignment of supplier and base period volume." See page 4, Plaintiff's response to Defendant's motion for dismissal, filed October 18, 1977. A subsequent order by the FEA directed that Foremost supply each of the Plaintiffs with a specified volume of gasoline. Plaintiffs apparently do not contend that Foremost has failed to supply Plaintiffs with the required volume of gasoline, as is their admitted obligation under the agreement, and the agreement itself does not expressly extend to price, credit terms or other requirements that the Plaintiffs would like to

read into the agreement. I find the agreements are in no way ambiguous on this point.

The FEA has recognized that under a three-party agreement, the Purchasers "entitlement" is limited to the volume of the product specified therein. (Interpretation 1977-28, 42 F. Reg. 46271, Sept. 15, 1977, hereinafter referred to as the "Mobil" decision). When a wholesale purchaser reseller receives FEA approval of termination of its base period supply relationship (in the context of a three party agreement approved by the FEA), it becomes a new "wholesale purchaser" under 10 C.F.R. 211.12(e). *Mobil decision.* Subsection (e) provides in part:

> "*New Wholesale Purchasers.* Wholesale purchasers which do not have base period suppliers and wholesale purchasers whose base period suppliers are unable to supply them with sufficient amounts of an allocated product shall be supplied as provided in this paragraph. 10 C.F.R. ¶ 211.12(e)."

Plaintiffs in this case were assigned to Foremost pursuant to FEA regulations whereby Plaintiffs are defined as "new wholesale purchasers" having no base period supplier. Under the *Mobil* decision and 10 C.F.R. §211.12(e) it is clear that Plaintiffs have no right to a price charged them by Foremost computed under regulations applicable to Arco. As discussed in *Mobil*, the three-party agreements entered into by the parties did obligate Foremost to supply specific volumes of gasoline to the Plaintiffs, but they did not obligate Foremost to supply those volumes of gasoline using Arco's pricing structures or Arco's normal business practices in calculating prices charged to Plaintiffs.

Any reliance Plaintiffs place upon 10 C.F.R. §211.25 is misplaced because that section refers to "substituted suppliers" whereas the three party agreements in the FEA order terminated Arco's obligation to supply Plaintiffs. Compare 10 C.F.R. §211.25 with 10 C.F.R. §211.9. Foremost is not a substitute supplier within the meaning of §211.25.

Plaintiffs also rely on 10 C.F.R. §212.111(c) (1) in arguing that that section requires Foremost to supply specific volumes to Plaintiffs at Arco's price. This section is not applicable however, because Foremost did not acquire a going business from Arco under the regulations. See F.E.A. Opinion Exhibit B to the motion to dismiss memorandum of Defendants Albert B. Alkek and Foremost, filed November 30, 1977.

Plaintiffs also rely heavily on the *Whitco* decision. 2 F.E.A., ¶83,170, (June 9, 1975). *Whitco* is procedurally distinguishable from this case. Whitco, Inc. requested an exception from the provisions of 10 C.F.R. §221.25 which would direct Sun Oil Co., Whitco's base supplier, to cease supplying that firm through a third party but rather supply Whitco directly. This case does not involve an exception proceeding but a three party agreement which expressly terminated ARCO's relationship with the Plaintiffs and the terms of that termination (and the terms of Foremost's new obligations to the Plaintiffs) were governed by this express agreement and subsequent FEA order. *See also Lee Moore Oil Co. v. Union Oil Co. of Cal.*, 1977-2 Trade Cases, Trade Reg. Reports §61,766.

Finally, any violation of sections 210 and 211 of the Economic Stabilization Act of 1970 must allege a "willful" overcharge. The standard for "willfulness" is the criminal standard, not the civil standard. *Longview Refining Co. et al v. Shore, et al*, 554 F.2d 1006 (TECA 1977). Plaintiffs' complaint does not allege a "willful" overcharge; in fact, in ¶55 of their complaint, Plaintiffs indicate they do not have to make

any showing of willfulness. Secondly, no facts in the complaint sufficiently detail the circumstances of a "willful" overcharge. Finally, I can discern no violation of the EPAA and regulations, and therefore if Defendants are in compliance with the EPAA, I cannot see how their actions in compliance "willfully" violated the Act.

Accordingly, the Court hereby dismisses with prejudice all of the Plaintiffs' claims against the Defendants asserted under the laws of the United States. The Court also dismisses without prejudice Plaintiffs' pendent claims asserted under state law against the Defendants. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 716 (1966); 13 Wright & Miller, Fed. Practice and Procedure, §3567 (1975).

It is so ORDERED.

/s/ ROBERT W. PORTER
United States District Judge

DATE: August 15, 1978

5. Federal Energy Administration Order — Termination of Supplier/Purchaser Relationship

FEDERAL ENERGY ADMINISTRATION
Region VI
Dallas, Texas

Date: 22 December 1976
Case No.: 06-034520

Mr. C. H. Broms
Atlantic Richfield Company
515 South Flower Street — Room 1915
Los Angeles, California 90051

ORDER
TERMINATION OF
SUPPLIER/PURCHASER RELATIONSHIP

This Termination Order is issued pursuant to the statutory authority of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. Section 751 et seq.) as amended by the Energy Policy and Conservation Act of 1975 (P.L. 94-163) and pursuant to the authority contained in the Mandatory Petroleum Allocation Regulations, 10 CFR, Chapter II, 39 FR 1924 (January 16, 1974) as amended.

The FEA has received a request from each of the applicants (see attached list) for approval of base period supplier relationship termination for motor gasoline and has reviewed each request in the context of applicable regulations.

Pursuant to 10 CFR Section 205.95(a), it is hereby ORDERED that the base period relationships between this supplier and the attached list of wholesale purchaser-resellers, wholesale purchaser-consumers and end-user accounts are terminated.

In compliance with the requirements of 10 CFR Section 205.95(b), a brief summary of the factual and legal basis upon which this Order is issued is as follows:

Foremost Petroleum Corporation purchased the ARCO light products distribution system in Texas and plans to resell product to the attached list of purchasers without substantially changing its form and is, therefore, a wholesale purchaser-reseller as defined in Section 211.51.

Applicants and ARCO have agreed to terminate their relationships, each having entered into three-party agreements with Foremost Petroleum Corporation whereby the latter has agreed to supply the applicants 246,099,882 gallons of motor gasoline per year (for individual volumes, see attached). Applicants have requested FEA approval of this termination.

On the basis of these agreements, the FEA has determined the requested terminations to be reasonable and is, by separate order dated November 18, 1976, permanently assigning the supply obligation to Foremost Petroleum Corporation.

Inasmuch as the supply of petroleum product will continue uninterrupted, the FEA has determined that there are no known persons who may be aggrieved by this application and/or FEA action.

You are hereby advised that this Order is subject to public disclosure by the Federal Energy Administration pursuant to the requirements of the Freedom of Information Act as amended, 5 U.S.C. Section 552, if a request is properly made for it by a member of the public.

Sincerely,

/s/ CURTIS E. CARLSON, JR.
for Ed. T. Barrie
Director of Operations

Attachments

* * *

6. Federal Energy Administration Assignment Order

FEDERAL ENERGY ADMINISTRATION
Region VI
Dallas, Texas

Date: 11-18-76
Case No.: 06-034520

Atlantic Richfield Co.
515 S. Flower St.
Room 1915
Los Angeles, Calif. 90051

Dear Sir:

In accordance with the authority vested in the Regional Administrator of Region VI, Federal Energy Administration, under the Mandatory Petroleum Allocation Program, this office hereby notifies you as a supplier that wholesale purchaser Foremost Petroleum Corp., P. O. Box 1399, Victoria, Tx. 77901 is hereby assigned to you for the duration of the Mandatory Petroleum Allocation Program pursuant to 10 CFR 205.30-205.39 (39 FR 35472, October 1, 1974) and 10 CFR 211.12(e)(3) (39 FR 35472, October 1, 1974) with base period supply volumes for motor gasoline as follows:

Jan.	18,870,027	July	20,887,421
Feb.	18,904,727	Aug.	21,518,149
Mar.	20,823,591	Sept.	20,304,028
Apr.	21,037,903	Oct.	20,782,808
May	21,117,234	Nov.	20,458,057
June	21,010,298	Dec.	20,385,639

Total 246,099,882 gallons

The legal and factual basis of this assignment is as follows:

Foremost Petroleum Corp. purchased ARCO's light products distribution system in Texas and has assumed supply

obligation for all customers formerly supplied by Atlantic Richfield. Allocated volumes are based on supply obligation in Texas per tri party agreements from numerous customers. ARCO has indicated a willingness to supply Foremost a like amount.

As a supplier you are obligated to provide to the wholesale purchaser whatever percent of his base period supply volume that your allocation fraction indicates for that month. The only exceptions to this rule are those which fall within the following use classifications:

1. Agricultural Production as set out in 10 CFR 211.51;
2. Department of Defense as specified in 10 CFR 211.26;
3. Space heating requirements of medical and nursing buildings (middle distillate).

These classes of purchasers, pursuant to Section 211.10, will be provided 100 percent of current requirements without regard to the supplier's current allocation fraction. Space heating requirements, other than those for medical and nursing buildings, shall be at an allocation level of 110 percent of base period use as reduced by the appropriate allocation fraction; except that if a supplier of middle distillate has an allocation fraction less than 0.8, that supplier shall supply the space heating requirement of end-users and wholesale purchaser-consumers at an allocation level of 88 percent of base period use, not subject to an allocation fraction.

You are hereby advised that you are required to accept the above referenced purchaser at the above stated allocation level and supply him within the limitations imposed by program regulations in order to be in compliance with this order.

=

You should be aware of the penalties and the action to which you are subject by the Petroleum Allocaton and Price Regulations should any person violate any provision of the regulations or any order issued pursuant thereto, 10 CFR 205.201-205.203 (39 FR 35472, October 1, 1974).

Any person aggrieved by this action may submit to this office an "Appeal of Order" within thirty (30) days of service of this order. All appeals must meet the requirements set forth in 10 CFR, Subpart A, Section 205.9 and Subpart H, Sections 205.100-205.109 (39 FR 35472, October 1, 1974). Attached is an outline of said requirements.

Sincerely,

/s/ Ed. Barrie
Ed. T. Barrie
Director of Operations

Attachment

6 FEA #11
Revised 3/30/76
(Assignment)

7. Federal Energy Administration Assignment Order (Model)

FEDERAL ENERGY ADMINISTRATION
Region VI
Dallas, Texas

Date: 11-22-76
Case No.: 06-034543

Foremost Petroleum Corp.
P. O. Box 1399
Victoria, Tx. 77901

Dear Sir:

In accordance with the authority vested in the Regional Administrator of Region VI, Federal Energy Administration, under the Mandatory Petroleum Allocation Program, this office hereby notifies you as a supplier that wholesale purchaser,

* * *

is hereby assigned to you for the duration of the Mandatory Petroleum Allocation Program pursuant to 10 CFR 205.30-205.39 (39 FR 35472, October 1, 1974) and 10 CFR 211.12 (e)(3) (39 FR 35472, October 1, 1974) with base period supply volumes for motor gasoline as follows:

Jan.	* * *	Apr.	* * *	July	* * *	Oct.	* * *
Feb.	* * *	May	* * *	Aug.	* * *	Nov.	* * *
Mar.	* * *	June	* * *	Sept.	* * *	Dec.	* * *

TOTAL * * * gallons

The legal and factual basis of this assignment is as follows: Applicant requested to change suppliers pursuant to 10 CFR Part 211.9(a)(2)(i). Both relinquishing supplier ARCO and acquiring supplier FOREMOST are agreeable to the transaction and to base period gallonage to be transferred.

As a supplier you are obligated to provide to the wholesale purchaser whatever percent of his base period supply volume that your allocation fraction indicates for that month. The only exceptions to this rule are those which fall within the following use classifications.

1. Agricultural Production as set out in 10 CFR 211.51;
2. Department of Defense as specified in 10 CFR 211.26;
3. Space heating requirements of medical and nursing buildings (middle distillate).

These classes of purchasers, pursuant to Section 211.10, will be provided 100 percent of current requirements without regard to the supplier's current allocation fraction. Space heating requirements, other than those for medical and nursing buildings, shall be at an allocation level of 110 percent of base period use as reduced by the appropriate allocation fraction; except that if a supplier of middle distillate has an allocation fraction less than 0.8, that supplier shall supply the space heating requirement of end-users and wholesale purchaser-consumers at an allocation level of 88 percent of base period use, not subject to an allocation fraction.

You are hereby advised that you are required to accept the above referenced purchaser at the above stated allocation level and supply him within the limitations imposed by program regulations in order to be in compliance with this order.

You should be aware of the penalties and the action to which you are subject by the Petroleum Allocation and

Price Regulations should any person violate any provision of the regulations or any order issued pursuant thereto, 10 CFR 205.201-205.203 (39 FR 35472, October 1, 1974).

Any person aggrieved by this action may submit to this office an "Appeal of Order" within thirty (30) days of service of this order. All appeals must meet the requirements set forth in 10 CFR, Subpart A, Section 205.9 and Subpart H, Sections 205.100-205.109 (39 FR 35472, October 1, 1974). Attached is an outline of said requirements.

Sincerely,

/s/ Ed Barrie
Ed. T. Barrie

If applicable, this order supercedes any previous assignment order issued by FEA Region VI naming ARCO as supplier for volumes listed above.

Legal Basis:

1. 10 CFR Part 211.12(e)
2. 10 CFR Part 205 Subpart C
3. 10 CFR Part 211.9(a) (2) (i) (E)

Factual Basis:

1. Applicant has requested assignment of supplier and base period volume.
2. Supplier has indicated a willingness to supply and supplier has ability to supply:
   - ____ a. From current entitlement;
   - ____ b. By certification pursuant to 211.13(c).
   - x c. Other.
3. Prime supplier has shown a willingness to supply assigned volumes in accordance with 10 CFR 211.12(e) based on:
   - x a. Notation and signature of FEO-17;
   - ____ b. Aggrieved party response;
   - ____ c. Failure to respond to notice made in accordance with 10 CFR 205.33(a).
   - x d. Per telecon — willing to supply.

   There has been no showing that this assignment will affect the allocation fraction of the Prime Supplier in Texas more than the limits as set forth in the FEA guidelines at Appendix Paragraph 13246.
4. Applicant is: (wholesale purchaser/reseller — consumer) marketer with base period volume or supplier.

5. No "countervailing factors" have been documented to FEA.
6. Assigned volumes are based on N/A comparable outlets of similar size and nature as applicant's outlet.
7. Average entitlement of comparable outlets is N/A monthly.
8. Area surrounding the proposed outlet is commercial/residential/rural/industrial. N/A
9. The proposed outlet will be a full-serve/self-serve N/A operation with — pumps.
10. Effective date of this order is:

    x A. Upon receipt.

    B. Upon outlet becoming operational.

    C. To expire upon completion of contract.

11. Three party agreement for change of supplier received by FEA.

    x A. Yes

    B. No

    C. N/A

12. Supplier(s) were notified of this assignment in accordance with 10 CFR 205.36(c).

8. **Three-Party Agreement (Model)**

"Date: _____

Case No.: _____

Federal Energy Administration
2626 W. Mockingbird Lane
Dallas, Texas 75235

The Federal Energy Administration is hereby petitioned to accept the following three-part agreement and to treat this agreement as a request by the purchaser for (1) termination of its relationship with its base period supplier and (2) assignment of the acquiring supplier and volume named below:

THREE-PARTY AGREEMENT
ATLANTIC RICHFIELD COMPANY

(Relinquishing Supplier)

hereby agrees with (the jobber), its base period purchaser, to terminate their supplier/purchaser relationship in accordance with the provisions of 10 CFR § 211.9(a) (2) (i). This agreement (subject to FEA approval) relieves the above-named supplier of the obligation to supply ..... gallons of motor gasoline per year. Upon execution of its portion of this Three-Party Agreement, the relinquishing supplier certifies that ..... gallons per year is the purchaser's (adjusted) base period volume and that the monthly volumes are as follows:

JAN.....	APR.....	JUL.....	OCT.....
FEB.....	MAY.....	AUG.....	NOV.....
MAR.....	JUN.....	SEP.....	DEC.....

FEA 04-164
(Rev 9/76)

FOREMOST PETROLEUM CORPORATION, INC.

(Acquiring Supplier)

hereby agrees to supply to (the jobber) its base period entitlement of ..... gallons of motor gasoline for the duration of the Mandatory Petroleum Allocation Regulations.

The parties to this agreement understand that upon termination, the relinquishing supplier shall file an amended application with its supplier pursuant to 10 CFR § 211.13(f), provided that it has previously filed a certification with its supplier for an upward adjustment pursuant to 10 CFR § 211.13. Accordingly, the suppliers of the relinquishing supplier will be required to downward adjust its supply obligation to the relinquishing supplier, provided that the allocation entitlement of the relinquishing supplier will not be adjusted below that supplier's base period use. The acquiring supplier may certify to its supplier, if required, a need for an upward adjustment to its base period volume on the basis of the forthcoming assignment order, in accordance with 10 CFR § 211.13(c).

The relinquishing supplier and the purchaser named herein understand that by executing this agreement they hereby waive their rights to appeal the forthcoming order terminating their supplier/purchaser relationship pursuant to this agreement. The purchaser named herein and acquiring supplier understand that by executing this agreement they hereby waive their rights to appeal the forthcoming assignment of supplier and base period volume pursuant to this agreement.

FEA 04-164
(Rev 9/76)

(WHOLESALE PURCHASER)	(Signature/Title Authorized Repr.)
(Street Address)	(Phone No.)
(City/State/Zip)	(Date)
Atlantic Richfield Company (RELINQUISHING SUPPLIER)	(Signature/Title Authorized Repr.)
515 South Flower Street (Street Address)	(213) 486-2682
Los Angeles, California 90071 (City/State/Zip)	(Date)
Foremost Petroleum Corporation, Inc. (ACQUIRING SUPPLIER)	(Signature/Title Authorized Repr.)
P. O. Box 1399 (Street Address)	512/578-3581 (Phone No.)
Victoria, Texas 77901 (City/State/Zip)	(Date)

*Prime Supplier of Relinquishing Supplier: .....

*Prime Supplier of Acquiring Supplier: .....

*Signature Unnecessary

FEA 04-164
(Rev 9/76)"

Supreme Court, U.S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

and

No. 78-1906

ATLANTIC RICHFIELD COMPANY, et al,
Petitioners,

v.

NEWMAN OIL COMPANY, et al,
Respondents.

On Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898
and
No. 78-1906

ATLANTIC RICHFIELD COMPANY; FOREMOST PETROLEUM CORPORATION; and ALBERT B. ALKEK,

Petitioners,

v.

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLES OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC.; KELSO OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; and BOSSE OIL CO.,

Respondents.

On Petition for Writs of Certiorari to the United States Temporary Emergency Court of Appeals

---

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Newman Oil Company, et al (identified above and in the Petitions) oppose the granting of the Petition For A Writ Of Certiorari of Albert B. Alkek ("Alkek") and Foremost Petroleum Corporation, Inc. ("Foremost") and the Petition For A Writ of Certiorari Of Atlantic Richfield Company ("ARCO") both to the United States Temporary Emergency Court of Appeals in Cause No. 5-32 in that Court.

STATEMENT

The statement of the case set forth in the opinion of The Temporary Emergency Court of Appeals of The United States ("TECA") is correct. (Appendix to this Brief; Appendix 1a, Alkek and Foremost Petition; and Appendix A-2, Atlantic Richfield Petition.) Each of the Petitions mischaracterizes the Opinion of TECA in their so-called "Questions Presented" and, as a consequence, in their "Statements". TECA determined that (1) there was a substantial procedural inadequacy in the trial court which *principally* necessitated the remand of the case for further proceedings and (2) the language of Section 210(a) of the Economic Stabilization Act, 12 U.S.C. 1904, note, (adopted by the Emergency Petroleum Allocation Act, 15 U.S.C. 754) is sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the Emergency Petroleum Allocation Act. Neither the "Questions Presented" by ARCO nor the "Questions Presented" by Alkek and Foremost addresses itself to the TECA decision and Opinion. ARCO casts a hypothetical question apparently designed as an attempt to make a particular prior case applicable to its answer.

Alkek and Foremost, on the other hand, attempt to cast a question solely in terms of "common law" fraud, although the remainder of their Petition clearly shows that the fraud in question was a fraud upon and involving a federal agency.

REASONS FOR NOT GRANTING THE WRITS

The decision and Opinion of TECA are imminently correct. Primarily, the Court vacated the judgment and remanded the case to the trial court because the concepts of notice and opportunity to be heard are fundamental and were inadequately provided for by the proceedings in the trial court.

In remanding, the Court of Appeals interpreted the language of Section 210(a) of The Emergency Stabilization Act (ESA), 12 U.S.C. 1904, note, as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751, *et seq.*

The Respondents contend, and it is a fact, that the so-called "Three-Party Agreements" (see the sample at A-29 of the ARCO Petition) were executed by each of the Respondents in reliance upon fraudulent representations by the Petitioners intended by the Petitioners to induce the Respondents to forego their rights under the EPAA.

One example of such rights, among others, is the waiver by the Respondents of their rights to appeal the orders issued by the Federal Energy Administration (the "FEA" and now the Department of Energy) pursuant to the Three-Party Agreements. As conceded by the Petitioners each of the Three-Party Agreements was "... an agreement with each Respondent *petitioning* the Federal Energy Admin-

istration ("FEA") to terminate ARCO's obligations as base period supplier and to assign those obligations to Foremost" (emphasis added, page 4, Alkek and Foremost Petition). Not only were the Three-Party Agreements each a fraudulently induced "contract", but each was a "petition" (i.e., a pleading) to a federal administrative agency fraudulently inducing the agency to issue "agreed", *nonappealable* orders. (See the last paragraph of the sample Three-Party Agreement at page A-30 of the ARCO Petition.)

Not only were the Three-Party Agreements *procured* by fraud upon the Respondents, but they were *filed* as a fraud upon a federal agency, the FEA. The regulations adopted by the FEA under the authority of the EPAA include specifically 10 CFR 205.203(f) which states:

> Willful concealment of material facts, or false, or fictitious or fraudulent statements or representations, or willful use of any false writing or document containing false, fictitious or fraudulent statements pertaining to matters within the scope of the EPAA or the FEAA by any person shall subject such person to the criminal penalties provided in 18 USC, § 1001 (1970). (CCH Energy Management, ¶ 13,402.30)

The violation of this regulation is a fraudulent wrong giving rise, under Section 210(a) of the ESA, to an expressed private right of action by an injured party (and if not expressed then clearly implied by Congressional intent).

Alkek and Foremost deal with semantical niceties in referring to the "arising under" language of 28 U.S.C. 1331 and 1337 and the "arising under" language of Section 211(a) of the ESA. These Sections are jurisdictional and do not create a cause of action as does Section 210(a) of the ESA relied upon by TECA. It is the *private cause of action* under federal law which a person may bring in "a district

court of the United States" which was in issue before TECA. The other statutes are jurisdictional *but* the "private right of action" under Section 210(a) (conceded by Alkek and Foremost in footnote 10, page 9, of their Petition) clearly is an action which any person suffering a legal wrong "may bring . . . in a district court of the United States".

Considering the language of Section 210(a) of the ESA, it can be seen that a private right of action is granted by Congress to "Any person suffering legal wrong *because of any act or practice arising out of* . . . (any) *regulation* issued pursuant (to the EPAA) . . ." (emphasis added). The private right of action is not with reference to cases "arising under" but with reference to "any act or practice arising out of" the regulations adopted pursuant to the EPAA.

Section 205.203(f) is without question a regulation adopted pursuant to the EPAA and *fraud* is without question an *act or practice* arising out of the violation of such regulation. The Respondents allege that they have suffered a legal wrong by virtue of the fraudulent representations of the Petitioners which were, as well, "Willful concealment of material facts, or false, or fictitious or fraudulent statements or representations or willful use of any false writing . . . pertaining to matters within the scope of the EPAA . . ." as described in the cited regulation.

The principal sleight-of-hand by the Petitioners seeks to remold the case to fit the totally different law and circumstances of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

The Petitioners, as indicated above, have sought to deal with the jurisdictional statutes of the Judicial Code and the ESA (28 U.S.C. 1331 and 28 U.S.C. 1337, 12 U.S.C. 1904,

note, Section 211, respectively). As observed by this Court in *Montana-Dakota, supra*, the question there was *not* the jurisdiction of the federal courts, *but* rather whether the complaining party had a federal cause of action. In accusing TECA of being "illusory" in its distinction between this case and *Montana-Dakota, supra*, the Petitioners totally ignore (except in footnote 10, p. 9, Alkek-Foremost, Petition) the presence here of Section 210(a) of the ESA and the total absence of any such statute in The Federal Power Act considered in *Montana-Dakota, supra*, (except perhaps Section 317 of the Federal Power Act, 16 U.S.C. 825p, cited by the minority).

Here as in *Montana-Dakota, supra*, the question was not "jurisdiction" *but* "cause of action". The statute considered by this Court in *Montana-Dakota, supra*, had specific reference to the "rate-fixing" power of the Federal Power Commission and there was present no clear Congressional statement as is found in Section 210(a) of the ESA.

Section 210(a) states:

> Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in Section 211), and/or damages.

Further, as quoted above 10 CFR 205.203(f), which was adopted by the FEA under the clear mandate of the Congress in the EPAA (15 U.S.C. 751, *et seq.*), describes fraud as an "act or practice" which arises "out of" the violation of the regulations. The fraudulently obtained Three-Party Agreements became, as well, a fraud upon the FEA when filed by the Petitioners.

The Respondents suffered legal wrong by virtue of such fraud. Not as suggested by the Petitioners, in connection with the discretionary powers of the FEA, *but* in connection with the already formulated pricing rules of the FEA as applicable to ARCO and Foremost, respectively. It is undisputed that the fraudulently obtained FEA orders changed the supplier of the Respondents from ARCO to Foremost. At the time there were existing formulated prices which ARCO could charge the Respondents and *higher* existing formulated prices which Foremost could charge its customers. The pricing rules were adopted substantially prior to the events in controversy as a part of the FEA's legislative function and not as a "rate-fixing" function comparable to that of the Federal Power Commission in *Montana-Dakota, supra.*

By fraudulently obtaining the Respondents' agreement to the change of supplier, the Petitioners fraudulently induced the FEA to order the change, without the exercise of any discretion and without a hearing and without appeal.

Petitioners are engaged in attempting to create an illusion. Contrary to *Montana-Dakota, supra*, upon which they principally rely, they have attempted to confuse "jurisdiction" and "cause of action". This Court specifically condemned such confusion in *Montana-Dakota, supra.* The *real* question here (answered correctly by TECA) is: Is a federal cause of action established? There is no question but what the federal courts here, as in *Montana-Dakota, supra*, have the *power* to determine the question. With this confusion eliminated from the impression sought to be imparted by the Petitions, it is clear that Petitioners must concede the existence of a private federal cause of action and the jurisdictional statutes relied upon are not in question.

For example, footnote 10, page 9 of the Alkek and Foremost Petition states:

> The court of appeals mistakenly cited section 210(a) of the ESA as the basis for federal jurisdiction. The decisions of that court already have established, and it is clear as well from the statutory text, that it is section 211(a) that confers jurisdiction, *whereas section 210(a) operates to establish a private right of action.* (Citation of cases omitted.) In any event, since the scope of section 210(a) also is restricted to matters "arising out of this title", even if section 210(a) were jurisdictional its reach would be no broader than that of section 211(a). (emphasis added)

ARCO implements the confusion by suggesting at page 13 of its Petition:

> As is evident, the scope of Section 1331 (federal question) and 1337 (commerce clause) is much broader than and overlaps that of Section 210(a) of the ESA. For that reason, the *Montana-Dakota* holding that a fraud action does not come within the purview of the two broad jurisdictional statutes establishes *a fortiori* that a fraud action similarly does not come within the narrower purview of Section 210(a).

Further, ARCO cites cases, at page 10 of its Petition, in which parties sought injunctive relief against the FEA itself with reference to orders issued by the FEA after a clear exercise of discretion. However, here there is *no* such attack upon the FEA, which may have unwittingly been a victim of the Petitioners' fraud as were the Respondents.

Although there was no clear Congressional statement present in *Montana-Dakota, supra*, such as we have here in Section 210(a) of the ESA, the minority agrees, at 341 U.S. 263, that:

> We do not think it likely that Congress intended that there should be no relief for this kind of tampering with the federal regulatory scheme other than that which might be afforded by the . . . law of . . . the states.

The Petitioners use convenient catch words such as "federalized fraud" and "common law fraud" to mask the presence of the private federal cause of action clearly provided in Section 210(a) of the ESA resulting from the "act or practice arising out of" the violation of the regulations in the form of the "willful concealment of material facts"; the "false, or fictitious or fraudulent statements or representations" and "the willful use of any false writing . . . pertaining to matters within the scope of the EPAA" such as are condemned by 10 CFR 205.203(f), adopted under the authority of the EPAA.

In any event, even if there were *not* an expressed federal private cause of action, it is not outlandish for the federal courts to imply a private federal cause of action in favor of a party suffering injury by virtue of the violation of a federal statute or regulation. *Kardon v. National Gypsum Company*, 69 F. Supp. 512 (E.D. Pa. 1946); *J. I. Case v. Borak*, 377 U.S. 426 (1964); *Cort v. Ash*, 422 U.S. 66 (1975); *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

The real lack of bona fides in the Petition, if not the perpetuation of the original fraud, is evident from the fact that ARCO contests the "jurisdiction" in whichever forum (the FEA or the courts) things are *not* going well for ARCO. For example, before the FEA in *Atlantic Richfield Company, Los Angeles, California*, 5 FEA ¶ 80,521 (CCH) at page 80,589, January 13, 1977, ARCO claimed unsuccess-

fully that the FEA was "without jurisdiction to issue the Remedial Order" because "under the provisions of Section 211(a) of the Economic Stablization Act of 1970 . . . the District Courts of the United States have exclusive original jurisdiction of cases or controversies arising under FEA regulations and orders".

Once the "jurisdiction versus cause of action" confusion sought to be created by the Alkek and Foremost Petition is unmasked, Alkek and Foremost concede that Section 210(a) deals with the creation of a cause of action just as was determined to be the case by TECA.

The effort by the Petitioners to divert attention from the real and substantial basis for the decision and opinion of TECA is, further, thwarted by the consistent deference of the FEA itself to the courts where issues of fraud are involved.

For example in *George P. Rios, Los Angeles County, California*, 4 FEA ¶ 83,008 (CCH) June 15, 1976; *Texaco, Inc., New York, New York*, 2 FEA ¶ 80,701 (CCH) October 6, 1975; and *Eagle Point School District No. 9, Eagle Point, Oregon*, 2 FEA ¶ 80,622 (CCH) June 1, 1975, the FEA has effectively held that it:

> will consider that termination of a base period supplier/purchaser relationship is warranted on gross inequity grounds if a determination has been made by a court of law that a purchaser has been defrauded by its base period supplier, or if a court of law has entered a judgment which would lead to the conclusion that the relationship between the supplier and the base period purchaser has deteriorated to the point where the purchaser's business operations would be significantly disrupted if it had to resume or continue a supply relationship with its base period supplier.

Although some of these cases involve state court proceedings instead of federal court proceedings, there is no basis for assuming that the position of the FEA would be different here. That is, the proper forum for determining issues of fraud is the courts. Here the act or practice is a violation of a specific federal regulation pertaining to matters within the scope of the EPAA, and Section 210(a) expressly provides a private cause of action in a United States district court.

CONCLUSION

For all of the foregoing reasons the Petitions are wholly without merit, if not frivolous, and should be denied.

Respectfully submitted,

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July 22, 1979

CERTIFICATE OF SERVICE

A copy of the above and foregoing Brief in Opposition has been served on counsel of record for each of the Petitioners.

APPENDIX
to
BRIEF IN OPPOSITION
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLIS OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO., INC.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; BOSSE OIL CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC. and KELSO OIL COMPANY,

PLAINTIFFS-APPELLANTS,

v.

ATLANTIC RICHFIELD COMPANY, ALBERT B. ALKEK and FOREMOST PETROLEUM CORPORATION, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

(No. CA3-77-0435-F)

(Argued December 15, 1978 Decided April 20, 1979)

JOHN FEATHER, Johnston and Feather, P.C., Dallas, Texas (John C. Gabbert on brief) for the Appellants.

THOMAS R. MCDADE, Fulbright & Jaworski, Houston, Texas (Alton F. Curry, Steven E. Segal, Louis S. Zimmerman, and David L. Tolin of the same firm on brief) for the Appellees, Albert B. Alkek and Foremost Petroleum Corporation, Inc.

GREGORY S. C. HUFFMAN, Thompson & Knight (Jerry L. Buchmeyer, and David R. McAtee of the same firm on brief and William John Rathje, Los Angeles, California, of counsel) for Appellee, Atlantic Richfield Company.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

HOFFMAN, Judge.

Appellants, a large number of local distributors of petroleum products, brought suit against appellees alleging violations of the antitrust laws of the United States and Texas, the Emergency Petroleum Allocation Act of 1973 (the EPAA), the Clayton Act as amended, and common law breach of contract and false representation. There is no diversity of citizenship involved. Appellees filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. The district court elected to interpret the motions to dismiss as motions for summary judgment, and dismissed with prejudice all of appellants' federal claims without any discovery proceedings. However, the court gave no notice to the parties that the motions were to be disposed of under Rule 56, and no opportunity was provided to file affidavits or other materials pertinent to appellants' claims. We are, therefore, compelled to reverse and remand for further proceedings.

The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, et seq. (1976), was enacted to alleviate the

shortages of petroleum products brought on by the Arab oil embargo. Distributors were required to return to the supplier who had supplied them in the 1972 base period, and were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of petroleum products they had received from the supplier in the 1972 base period as compared to the total output of that refiner in the corresponding period of each year thereafter. Cost increases in refining the product are added to the base prices, primarily on a dollar-for-dollar basis. Provision is made for changing or substituting suppliers, pursuant to regulations of the Federal Energy Administration.[1]

The Atlantic Richfield Company (ARCO) was appellants' 1972 base period supplier. In late 1976 or early 1977 ARCO sold its Texas pipeline terminals to the Foremost Petroleum Corporation (Foremost) at which time ARCO, Foremost and each of the appellants executed three-party agreements on standard FEA forms which petitioned the agency to terminate ARCO's obligations as base period supplier and to assign the appellants' base period entitlements to Foremost. The three-party agreements were submitted to the agency for approval, and the FEA subsequently entered orders based on the agreements. The agreements make no mention of price, but refer only to volume. Appellants allege in the fourth count of their complaint that Albert B. Alkek, who exercised full authority over the day-to-day petroleum sales and distribution operations of Foremost, "falsely promised that each of the Plaintiffs would have the same price and other terms for the purchase of motor gasoline and diesel fuel as they had with ARCO (the base period

[1] FEA became a part of the Department of Energy on October 1, 1977, 42 U.S.C. § 7151(a); Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). This opinion will refer generally to the FEA, as did the order of the district court.

supplier) and in effect would enjoy the same business practices as prevailed with ARCO during the base period subject to the legitimate adjustments available to ARCO." Appellants allege that within weeks thereafter Foremost "willfully and maliciously" instituted unilateral discriminatory and retaliatory price increases with intent to injure the appellants and remove them from competition with Foremost. In addition to price increases, appellants allege that Foremost willfully imposed discriminatory supply terminal requirements, withheld established freight allowances, and restricted credit terms, all contrary to normal business practices. The sixth count of the complaint sought recovery of damages against Foremost for breach of contract, against Alkek for inducing such breach of contract, and against both Foremost and Alkek for false and fraudulent promises and representations.

The fourth count alleges that "the Defendants [including ARCO] have undertaken a willful course based upon false and fraudulent promises to knowingly and drastically vary the base period supplier-purchaser relationships had by the Plaintiffs and other members of the Class." This allegation of fraud, while thin as to ARCO, is sufficient to withstand a Rule 12(b) (6) motion.

On December 15, 1977, the district court held a hearing on the appellees' motions to dismiss. No court reporter was present. The opinion of the district court indicates that, at the time of the hearing, counsel for both sides were in apparent agreement that the key issue in the case was whether or not Foremost was required to supply the appellants with motor fuel at ARCO's base price, and that the antitrust allegations made in appellants' complaint derived in their entirety from the alleged violations of the EPAA and the regulations promulgated thereto. Counsel for appellants stated at oral argument that the district court had indicated it would rule on the motion to dismiss within a week or ten days, and that the court at no time intimated that it intended to consider the motions under Rule 56. This statement is not contradicted. Eight months later the court entered the order granting summary judgment for the appellees.

The 1946 amendment to Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Moore's instructs: "It will also be observed that if a motion under Rule 12(b) (6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment." Advisory Committee Note of 1946 to Amended Subdivision 12(b) *Moore's Federal Practice*, Vol. 2A, ¶12.09[3] n. 25, at 2302. *See also* Wright and Miller, *Federal Practice and Procedure*, Vol. 5 § 1366, at 683. Rule 56(c) requires a ten-day period from the offering of the motion to the hearing of the motion, during which affidavits may be made and offered. Courts have required strict adherence to this notice requirement when a Rule 12(b) (6) motion is converted into a Rule 56 motion. *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977); *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976). It is not necessary that the no-

tice of the conversion of the 12(b)(6) motion to one for summary judgment be made by written order; however, the record must demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity to the non-moving party to rebut the converted motion. Since there is nothing in the record to indicate that the requisite notice was given, we find it necessary to reverse and remand to the district court. We express no view as to the final result in this case or whether, after further proceedings, a motion for summary judgment is in order.

A substantial question has been raised on appeal as to the jurisdiction of the federal court over claims involving common-law fraud. In essence appellants' theories of recovery center on their contention that they executed the three-party agreements as a result of assurances received from Alkek that prices and terms when dealing with Foremost would be "at least as good as those supplied by ARCO."[2] From this beginning point appellants sought to establish either that the three-party agreements are broad enough to include an agreement on price, or that pertinent FEA regulations establish price because of the nature of Foremost's acquisition of ARCO's terminals. Alternatively, appellants alleged that the assurances they received were fraudulent and constituted a willful attempt to circumvent the petroleum allocation act and regulations. Appellees argue that allegations of fraud are state law claims not cognizable in federal court under the jurisdictional prerequisites of the Economic Stabilization Act (ESA).

The EPAA, at 15 U.S.C. § 754(a)(1), adopted the provision for damages or other relief of the ESA, 12 U.S.C. § 1904

[2] Statement of counsel at oral argument on appeal.

note (1969 Supp.).[3] This court has broadly interpreted § 210(a) of the ESA to allow the recovery of any damages arising from any legal wrong, and has interpreted § 210(b) as creating a special remedy for overcharges rather than a limit on damages available under § 210(a). *Griffin v. United States*, 537 F.2d 1130, 1135-36 (Em.App. 1976); *cf Arnson v. General Motors Corporation*, 377 F.Supp. 209, 212 (N.D. Ohio 1974). There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 241, 250 (1951).[4] Jurisdiction in that case, however, was derived from 28 U.S.C. §§ 1331 and 1337 as a civil action arising under an act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for "[A]ny per-

[3] § 210. Suits for damages or other relief.

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulations issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211) and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharges upon which the action is based, or

(2) not less than $100 or more than $1,000; . . . .

[4] This case involved two public electric utilities companies who were at one time under the same management through interlocking directorships and joint officers. During that relationship the two

son suffering legal wrong because of any act or practice arising out of this title. . . ." We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

It is the failure of the court to give notice of the conversion of the motion that principally necessitates the remanding of this case for further proceedings. We find no error in the manner in which the court construed the termination agreements on their face. The agreements make no mention of price, and the FEA has ruled that a purchaser who enters into a termination agreement, requesting and receiving FEA approval of the termination, thereby becomes a new wholesale purchaser under the express language of 10 C.F.R. 211.12(e). Interpretation 1977-28, 42 Fed. Reg. 46271, Sept. 15, 1977 (Mobil Oil Corporation). While we believe that appellants sufficiently stated their allegations of fraud and willfulness in the fourth and sixth counts of their amended complaint, we appreciate the opinion of the district court that price is the key issue, since it would appear that appellants' allegations of fraud were at all times secondary to their attempt to establish price under the per-

companies interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. The plaintiff company alleged that the interlocking directorships resulted in a constructive fraud, in that it paid unreasonably high prices for what it received, and unreasonably low rates for what it provided. The Court in effect held that it was the exclusive power of the Commission to establish reasonable rates, and that the Federal Power Act added nothing to the pre-existing common-law right not to be defrauded into paying an excessive or unreasonable rate. Mr. Justice Frankfurter dissented, joined by three other justices.

tinent regulations.[5] Nevertheless, "[T]he concepts of notice, admissibility, and opportunity to be heard are ancient primaries. . . . However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice." *Davis v. Howard, supra,* at 572.

VACATED AND REMANDED.

[5] Econ-O-Gas, Inc., an appellant herein, submitted an application for exception and petition for special redress to the Department of Energy, seeking relief from the three-party agreement it had signed with ARCO and Foremost. In denying relief, the DOE stated that Econ-O-Gas had not alleged that it was coerced in entering into the three-party agreement, and added that it was not the FEA's responsibility to make certain that Econ-O-Gas had read and understood the pricing regulations which would govern its relationship with Foremost or that the firm had reached a contractual relationship which it would find satisfactory from a business standpoint. Apparently fraud was not alleged before the DOE. See *Econ-o-Gas, Inc.,* Case Nos. DEE-1416, DSG-0031, 2 DOE ¶ ——— (February 12, 1979).

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

NEWMAN OIL COMPANY, et al.,
Respondents.

REPLY BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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August 21, 1979

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The Brief In Opposition by Plaintiffs (Respondents in this Court and Appellants in the Temporary Emergency Court of Appeals) maintains that the petitions for writ of certiorari by Atlantic Richfield Company (No. 78-1898) and by Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) intentionally disregard Plaintiffs' supposed federal cause of action under 10 C.F.R. § 205.203(f), for which reason the petitions for writ of certiorari assertedly should be denied as "wholly without merit."

The assertion of an express and/or implied private cause of action under 10 C.F.R. § 205.203(f) is a reiteration of exactly the same argument made by the Plaintiffs to the Temporary Emergency Court of Appeals. *See* Appellants' Post-Submission Brief. However, the opinion and decision by the Temporary Emergency Court of Appeals eschewed holding that such a private cause of action exists, and construed the claims by Plaintiffs as merely "involving common-law fraud." *See* Opinion p. 6 (A-7)[1]. As the Reply

[1] All appendix page references in this Reply Brief are to the Appendix in the Petition for a Writ of Certiorari previously filed by Atlantic Richfield Company.

Memorandum of Petitioners Albert B. Alkek and Foremost Petroleum Corporation, Inc. in this Court ably demonstrates (which Reply Memorandum Atlantic Richfield Company generally adopts and incorporates herein), such a supposed cause of action based on 10 C.F.R. § 205.203(f) was never properly raised by the Plaintiffs in their trial court pleadings, has never received recognition or approval by either the trial court or the Temporary Emergency Court of Appeals, and fails as a matter of law to support Plaintiffs' complaint of price overcharges.

Even more fundamentally, Plaintiffs' argument still directly conflicts with this Court's decision in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the case on which the petitions both of Atlantic Richfield Company (No. 78-1898) and of Albert B. Alkek and Foremost Petroleum Corporation, Inc. (No. 78-1906) are principally based.

Plaintiffs' theory of liability, as expressed in Respondents' Brief in Opposition, alleges that the Petitioners fraudulently obtained the Plaintiffs' signatures on the three-party agreements [*see* Three-Party Agreement (Model), at A-29 to A-31]. Plaintiffs further state that the three-party agreements were submitted to the Federal Energy Administration, which then ordered that Foremost Petroleum Corporation, Inc. would become the new supplier for the Plaintiffs. This order by the FEA, Plaintiffs maintain, allowed Foremost Petroleum Corporation to charge the Plaintiffs a higher regulated price than the price which Atlantic Richfield had formerly been allowed by the regulations to charge the Plaintiffs. *See* Respondents' Brief In Opposition, p. 7.

By the express terms of the three-party agreements, Foremost Petroleum Corporation, Inc. was to be designated

as the Plaintiffs' new supplier pursuant to 10 C.F.R. § 211.9(a)(2)(i), which provides as follows:

> Unless otherwise provided in this part or directed by FEA, the supplier/wholesale purchaser-reseller relationships defined by specific dates or base periods or otherwise imposed pursuant to this part shall be maintained for the duration of the Mandatory Petroleum Allocation Program and may not be waived or otherwise terminated without the express written approval of FEA.

The law is quite clear that any changes in the supplier/wholesale purchaser-reseller relationships ordered by FEA are discretionary acts by the Agency. *Amtel, Inc. v. FEA*, 536 F.2d 1378 (TECA 1976).[2] For this reason Plaintiffs'

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[2] As stated in *Amtel, Inc. v. FEA, supra,*

> By requiring the attainment of the specified objectives of the Allocation Act "to the maximum extent *practicable*" (emphasis added), 15 U.S.C. § 753(b)(1) (1976 Supp.), Congress recognized that the objectives were to a certain extent inconsistent and intended that the FEA would exercise its discretion in achieving a workable balance among them.

536 F.2d at 1383.

> [S]uch cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. * * * It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

536 F.2d at 1384, quoting from *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 574, 580-584 (1940)

contention that the FEA did not exercise its discretionary authority in replacing Atlantic Richfield Company as Plaintiffs' supplier (and according to Plaintiffs, increasing the maximum price chargeable to Plaintiffs) cannot be sustained.

As in *Montana-Dakota*, Plaintiffs are caught between Scylla and Charibdis. To the extent that the Plaintiffs maintain that the FEA's designation of Foremost Petroleum Corporation, Inc. as the Plaintiffs' new supplier was the cause of the increased charges ("injury") to the Plaintiffs, *Montana-Dakota* forbids any court (federal or state) from invading the agency's discretionary jurisdiction by speculating as to what action the FEA would have taken absent the alleged fraud.[3] If the Plaintiffs were to maintain that the FEA's orders were not the cause of their injury, their cause of action would be one merely for common-law fraud, which *Montana-Dakota* requires be brought in state court, absent diversity of citizenship jurisdiction. In neither instance would the federal courts now have jurisdiction over the Plaintiffs' cause of action.

The Temporary Emergency Court of Appeals has been misled into violating this Court's decision in *Montana-Dakota*. If federal courts are to avoid infringing the exclusive discretionary jurisdiction of federal agencies and the common-law jurisdiction of state courts, the door opened by the Temporary Emergency Court of Appeals in this case must be closed now by this Court.

[3] That the FEA had the power to substitute Foremost Petroleum Corporation, Inc. for Atlantic Richfield Company, without Plaintiffs' consent, is clear. *See, e.g.*, 10 C.F.R. § 211.14(d).

For the reasons stated previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

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